

NATIONAL CABLE SATELLITE CORPORATION

Provider of C-SPAN and C-SPAN 2

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Corporate Vice President and General Counsel

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BY COURIER

Office of the Secretary

Federal Communications Commission

1919 M Street, N.W.

Washington, D.C. 20554

**Re: Reply Comments of the C-SPAN Networks in the
Matter of Carriage of the Transmissions of Digital
Television Broadcast Stations
CS Docket No. 98-120**

Dear Sir/Madam:

Enclosed are one original and nine copies of National Cable Satellite Corporation's reply comments in the above-referenced proceeding.

Respectfully Submitted,

NATIONAL CABLE SATELLITE CORP.

By:



Bruce D. Collins, Esq.

Corporate Vice President and
General Counsel

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DIGITAL MUST CARRY

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
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In the Matter of)
)
Carriage of the Transmissions)
of Digital Television Broadcast Stations)
) CS Docket No. 98-120
Amendments to Part 76 of the Commission's)
Rules)

REPLY COMMENTS of the C-SPAN NETWORKS
(National Cable Satellite Corporation)

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December 22, 1998

**REPLY COMMENTS of the C-SPAN NETWORKS
(National Cable Satellite Corporation)**

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REPLY COMMENTS of the C-SPAN NETWORKS
(National Cable Satellite Corporation)

I. INTRODUCTION and SUMMARY

The C-SPAN Networks file these Reply Comments in the above-referenced rulemaking in part to correct the false statements made by others during the initial Comments cycle about our bad experience with the analog must carry rule, and to expand on the reasons for our strong opposition to *any* form of must carry status for digital broadcast signals.

The C-SPAN Networks are full time satellite delivered public affairs television programming services available primarily via cable television, and devoted entirely to information and public affairs, including the live gavel-to-gavel coverage of the proceedings of the U.S. House of Representatives (on C-SPAN), the U.S. Senate (on C-SPAN2) and a variety of other events at public fora around the country and the world.¹

¹ In September of this year we launched "BookTV" as a network-within-a-network. It consists of 48 hours of book-related programming and is available on C-SPAN2 each weekend from Saturday morning to Monday morning. The C-SPAN Networks also include C-SPAN Extra, a day-time programming service launched in September of 1997 providing coverage of public events on a live basis. C-SPAN is available in over 73 million households. C-SPAN 2 is available in over 51 million households. C-SPAN Extra is available to over 800,000 homes and offices, many of which are located in the Washington, D.C. area.

The C-SPAN Networks are produced and distributed by the National Cable Satellite Corporation ("NCSC"), a non-profit educational corporation in the District of Columbia. NCSC is exempt from federal income tax pursuant to I.R.C. Sec. 501(c)(3).

II. CONTRARY TO THE N.A.B.'s WISHFUL AND ULTIMATELY SELF-SERVING VIEW OF HISTORY, THE ANALOG MUST CARRY RULE CAUSED CARRIAGE OF THE C-SPAN NETWORKS TO BE CUT BACK OR ELIMINATED ALTOGETHER IN MILLIONS OF HOUSEHOLDS, AS OUR INITIAL COMMENTS DEMONSTRATED CLEARLY AND UNEQUIVOCALLY.

In its initial Comments the National Association of Broadcasters ("NAB") again demonstrated its inability to accept the truth of the damage that the analog must carry rule caused to C-SPAN's and C-SPAN2's distribution, and, therefore, to our free speech rights. The NAB also attempts to cloud the debate with at best, fallacious reasoning, or at worst, disingenuous conclusions about our position, the purpose of which is, apparently, to trivialize our First Amendment claims.

As we testified to Congress last July and said again in our initial Comments here last month, "the cumulative effect of the analog must carry rule on the C-SPAN Networks was that over 3.5 million households lost access to all or a part of our public service programming."² We also reported that "even after 5 years of effort by the cable industry to restore that lost carriage, over 1.5 million households remain with less access to our programming" than they had before the effective date of the 1992 Cable Act.³ In both our testimony to the Senate Commerce committee and in our initial Comments we included a community-by-community list of where the injury to our First Amendment right to speak continues to this day.

Yet, the NAB claims, in so many words, it never happened.

In its failed effort to use the past as a defense of its wishful view of the future, the

² Comments of the C-SPAN Networks (hereafter, Comments of C-SPAN) at 5.

³ *Id.*

NAB's Comments baldly state that "*[a]s was true before* [meaning under analog must carry], C-Span [sic] and other cable programmers will not be hurt by [digital] must carry." [emphasis supplied]⁴ We submit that merely saying a thing does not make it so. We refer the Commission to the record.

Nor does saying a false thing twice make it true, although the NAB must think so. The NAB also included in its Comments its letter of May 29th to several members of the House and Senate and to the Commission.⁵ The NAB letter contended that the C-SPAN Networks suffered no constitutional harm simply because our overall subscriber count is greater today than it was before the analog must carry rule became effective in 1993.

At least two significant points come to mind in response. First, subscriber growth does not alter the fact that the C-SPAN Networks lost subscribers as a direct result of the must carry rule. Second, such growth is of absolutely no constitutional significance. Our ability to reach new subscribers (either from new system launches or from internal growth of the systems that did not drop or cutback our networks) does not relieve the First Amendment injury of losing full or part time access to other subscribers. Our protected speech (in the form of our public affairs programming) which cable system subscribers might have preferred to receive was reduced or lost outright, either temporarily or permanently. The existence of that harm is not lessened simply because another household in some other place can now watch C-SPAN or C-SPAN2.

The NAB has concluded, in effect, that because the population grew, nobody died.

The fact that we were successful over a period of 5 years in reacquiring some subscribers or obtaining new ones does not make the First Amendment injury melt away. The

⁴ Comments of NAB at iii.

⁵ Comments of NAB, Appendix F.

subscribers or obtaining new ones does not make the First Amendment injury melt away. The NAB suggestion that it does amounts to a facile distraction that even the least thoughtful analysis will discount out of hand.

III. DIGITAL MUST CARRY WOULD BE AN INFRINGEMENT OF OUR FIRST AMENDMENT SPEECH RIGHTS REGARDLESS OF OUR BAD EXPERIENCE UNDER ANALOG MUST CARRY.

Ultimately, our claim of the unconstitutionality of digital must carry does not rest solely on the record regarding the C-SPAN Networks under analog must carry. Although we do not minimize the harm we suffered in the past, and we certainly do not want that harm erased from the record by revisionist historians at the NAB, the fact is that a digital must carry rule all by itself carries enough speech infringement weight to sink it under any constitutional tests.

The simple fact is that if cable operators are also required to carry broadcasters' digital signals during the transition period, there will be fewer cable channels available to programming services like C-SPAN and C-SPAN2. This will be so because many systems are channel locked and because the number of programmers seeking carriage has always exceeded the number of available channels.⁶ The result, especially during the early years of the transition, will be that incumbent program services will be bumped in order to accommodate the broadcast signals.

The effect on the ability of C-SPAN Networks and others to reach subscribers will be immediate and significant in constitutional terms, as we demonstrated in our Comments. First, it will cause C-SPAN and C-SPAN2 to be dropped or cut back from carriage, as demonstrated in the probability study conducted by Economists Incorporated.⁷ Second, it will slow or even halt our slow recovery from the carriage losses we suffered and continue to suffer under the

⁶ Comments of NCTA at 47-48.

⁷ Comments of C-SPAN, *A Probability Model of the Effects of Digital Must Carry Rules on the C-SPAN Networks*, Economists Incorporated, at Exhibit B.

analog must carry rule.⁸ Third, it will bring to a standstill our ability to extend the distribution of our day-time service, C-SPAN Extra.⁹ Fourth, it will keep on the shelf our long ago announced plans for C-SPAN4 and C-SPAN5, the launches of which were aborted when available channel capacity dried up after the must carry rule became effective.

These effects are all burdens on our First Amendment speech rights, none of which have yet been justified as advancing any substantial governmental interest articulated by Congress.¹⁰

IV. DIGITAL MUST CARRY DURING THE TRANSITION PERIOD WOULD SET BACK, RATHER THAN ADVANCE THE PUBLIC INTEREST...AND THE KEY WORD IS *PUBLIC* INTEREST -- NOT *BROADCASTER* INTEREST.

The Commission should reject a "broadcaster first" approach in deciding this issue. To serve the public interest the Commission should adopt a "viewer first" approach that recognizes the primacy of consumers, citizens, real people -- the general public -- over broadcast businesses *per se*.

A. The Cable Industry Has Created Many Public Affairs Programming Services That Will Be Put at Great Risk by a Digital Must Carry Rule.

The public interest in telecommunications is comprised of many elements, including the delivery of sports and entertainment programming. The cable television industry has created literally scores of new programming networks, many with wholly new formats, and some of

⁸ The harm of analog must carry is a continuing one as so-called "dormant" licenses are activated by investors who see revenue opportunities in owning a broadcast signal that will be guaranteed market wide distribution of a good quality television picture on the local cable system. Most recently in September of this year, C-SPAN2's full time carriage on the Houston, TX system was reduced to half time, day-time carriage in order to accommodate the must carry demand of KTBU (a previously "dormant" UHF frequency) on a full time basis. The Houston cable system has 79 channels, of which 13 are given over to meet must carry obligations.

⁹ The burden of analog must carry on cable systems is responsible not only for having stalled C-SPAN Extra's distribution growth, it is also responsible for the service's day-time only status.

¹⁰ Nor may the Commission articulate the kind of "legislative"-type finding that would justify the burden on speech. See: Comments of C-SPAN, Note 31 at 11.

those networks have even revived old movies and classic broadcast television programs. But the public interest also includes news, information and public affairs programming. In these Reply Comments and in the context of both the First Amendment and public interest aspects of this issue, we ask the Commission to be mindful of the cable industry's other public affairs programming services that a digital must carry rule would put at risk.

The still-new non-profit MGTV (Michigan Government Television) network, now reaching approximately 1.5 million homes and businesses in Michigan with its C-SPAN-like coverage of legislative proceedings and public events, has forcefully commented that digital must carry "would have devastating effects" on its distribution in light of the many already channel-locked systems in the state.¹¹ The non-profit PCN (Pennsylvania Cable Network) now reaches only 2 million of the 3.2 million households in the state, but it would come closer to full distribution were it not for limited channel capacity.¹² As with the C-SPAN Networks, PCN would lose carriage in large numbers and all hope of continuing its steady recent growth would evaporate if cable operators are compelled to give every local broadcaster a second cable channel during the transition.

The cable industry is also responsible for the California Channel, which distributes state governmental proceedings to 5.2 million households statewide via cable systems. Its Reply Comments in this proceeding will relate the same story: digital must carry will cut its viewing potential in half, and will imperil its carriage on virtually all state cable systems. Washington's TVW is in a similar position. That non-profit state-based public affairs programming service is just as dependent on cable systems as are the others, and will suffer losses in distribution just as the others will, if digital must carry is imposed.

¹¹ Comments of MGTV at 2.

¹² Comments of PCN at 8.

Finally, the decades-long effort to create a C-SPAN-like public affairs network in New York State will be stalled once again by digital must carry. A now-defunct cable service carrying the state legislature was never able to be seen outside of the Albany, NY area because other cable systems did not have spare capacity. A more recent effort to put the legislature on state-wide television has been slowed due to limited channel capacity throughout the state. A digital must carry regime would leave even less capacity available for this public service effort.¹³

These state versions of the C-SPAN Networks have key characteristics in common. They would not exist if the cable television industry did not commit scarce channel space to them. They are organized on a non-profit basis. They provide gavel-to-gavel coverage of the public's elected representatives sitting in legislative session. They do not return advertising revenue to cable operators. And most significant in this context, the cable industry carries them because they serve an important public interest and add value to their subscribers, not because the Congress, the FCC or the state government has ordered them to do so. Yet, if the federal government grants must carry status to digital broadcast signals, these public service oriented programmers created by the cable television industry will be relegated to second class status by government fiat.

B. The Impressive Record of the C-SPAN Networks and Other Cable Programmers in Covering the Off-Year Elections is Only the Most Recent Evidence of Non-Broadcast Television Serving the Public Interest...and It Should Not be Discounted.

Increasingly with each election cycle cable programmers, both local and national, are the preferred sources of information for television viewers about the campaign process and

¹³ See: "Golisano eyes C-SPAN clone for New York," *Rochester Business Journal*, Nov. 13, 1998, p. 1. "Cable providers now are stretched to the limit with cable-channel slots already full...And complicating the possibility of any new satellite feeds is the specter of digital high-definition television, whose roll-out could force cable providers to make room for new HDTV channels on the already strained system."

election night results. Sometimes they are the *only* source as many commercial broadcast stations move away from election coverage. As NCTA President & CEO Decker Anstrom documented in his November 12, 1998 letter to the Commission's chairman, Washington, D.C. area residents, as just one example, received "far more extensive" election night coverage from local and national cable services than they did from the local broadcast stations.

C-SPAN's *Campaign '98* coverage was an important part of that mix in the Washington, D.C. area and throughout the country. In addition to hundreds of hours of original programming related to gubernatorial, Senate and House races, *Campaign '98* also included full coverage of well over a hundred formal candidate debates in prime time, most of which (but not all) were sponsored by local broadcast stations.¹⁴

However, in more than a few major markets, C-SPAN filled the public service gap when the local broadcast stations declined to carry a major candidate debate live, during prime time, or even at all. For example, WBBM-TV Channel 2 in Chicago co-sponsored and produced a debate between the candidates for governor of Illinois, but it nevertheless declined to televise it live on Friday evening at 7 pm. Instead, WBBM aired its own debate the following Saturday morning at 7 am.¹⁵ Cable subscribers were able to watch it conveniently in prime time on C-SPAN. In Los Angeles, the country's second largest television market, C-SPAN provided the *only* coverage of two gubernatorial debates when *not one* of the sixteen commercial stations in the market chose to carry them on any basis.¹⁶ Again, C-SPAN carried

¹⁴ See: C-SPAN *Campaign '98* Advertisement, attached as Exhibit A.

¹⁵ Pearson, Rick & Kuczka, Susan, *Chicago Tribune*, October 16, 1998: "Camille Johnston, Communications director for WBBM-TV, said that the station had only a limited amount of time that it is able to control to broadcast local news events and that the Saturday morning slot is one of those times...`We're a network-owned and operated station. We're not an affiliate that can determine whether or not they're going to carry a network schedule.'...Channel 2 viewers will see *Kids Say the Darndest Things* and *Candid Camera* [instead of the debate]."

¹⁶ Lindlaw, Scott, *The Associated Press*, October 15, 1998: "For the second time in a row, many viewers in that city [Los Angeles] will not be able to watch the [October 15th] gubernatorial debate. Cable subscribers who get

both debates. In Ohio *The Cleveland Plain Dealer* editorialized that "[c]ommercial television has been AWOL from the Ohio governor's race,"¹⁷ citing lack of coverage of the gubernatorial campaign, including coverage of the October 22nd debate featuring the four candidates:

Debate? Even though it was available live to ABC affiliates at 7:30 pm, Cleveland's WEWS Channel 5 waited until 12:05 am today to broadcast it. Heaven forbid the station pre-empt *Vengeance Unlimited* for a prime-time discussion of issues. C-SPAN, fortunately, carried the debate live.¹⁸

Indeed, few Ohioans were able to watch the debate conveniently as it was taking place. "Only WTVG-TV in Toledo plans to carry the debate live on commercial TV in the state," reported the Associated Press. "The station offered it to other ABC-affiliated stations around Ohio, but most weren't interested, opting to carry *Vengeance Unlimited* from 8 - 9 pm. Cable viewers may be able to see the debate on C-SPAN, and WCPO-TV in Cincinnati will show it on tape-delay at midnight."¹⁹

We are not suggesting by citing these examples that the broadcast television industry as a whole does not provide important coverage of elections. But they do indicate a trend that is apparent to every watcher of television, and that trend should be given full consideration by the Commission. We certainly believe that the C-SPAN Networks and other cable programmers have stepped up to the public service plate, and they have done it without the Communications Act requiring them to do it. As the Commission considers whether a digital must carry rule is appropriate, it must factor in the certain loss to the public interest when the rule leads to the certain reduction and elimination of the C-SPAN Networks and other similar programmers

C-SPAN will be able to watch it, but no commercial station will carry it, said Vic Biondi, media coordinator for the debates. No commercial station in Los Angeles carried the Sept. 23 debate."

¹⁷ Hallet, Joe, *The Cleveland Plain Dealer*, October 23, 1998, "If Candidates Were Fender-Benders, TV Would Find Them" (Editorial).

¹⁸ *Id.*

¹⁹ Seewer, John, *The Associated Press State & Local Wire*, October 21, 1998.

from channel lineups across the country.

C. The Commission Should Give Great Weight to Those Who Use, Learn From and Depend on the C-SPAN Networks and Other Cable Programmers...They are the *Public* in the Public Interest.

Comments in this proceeding were filed by several individuals who told the Commission how their access to the C-SPAN Networks was important to them as professionals, parents, activists, or citizens. The Commission should not ignore them because they contain the stories of people who derive real benefit from our programming, and who will be poorer for its loss. Any calculation of the public interest benefits and harms of digital must carry should consider their voices.

For example, a professor at the U.S. Naval Academy regularly incorporates C-SPAN programming into his course work assigned to cadets.²⁰ A Louisiana woman who became engaged in public affairs through C-SPAN reports on her election to a county-level party office and then to a state-level office, and that she continues to depend on C-SPAN for "access to a wide range of thorough and pure public affairs information."²¹ In Virginia, a teacher in the public schools regards "C-SPAN an invaluable source for any educator" and she offers that "[n]owhere on television, except C-SPAN, can teachers find this wealth of material to supplement their texts, and make politics and government come alive for their students."²² Another teacher from Florida "reminds" the Commission that teachers across the nation "are participating in growing numbers in C-SPAN's successful education outreach program" and that "the hardship created by replacement or reduction of this programming is real."²³ Another

²⁰ Comments of Stephen Frantzich.

²¹ Comments of Elizabeth Weber Levy.

²² Comments of Sally Souder.

²³ Comments of David M. Debs.


commenter, a Virginia college professor, declares that the loss of C-SPAN "would limit my opportunity as a consumer of world events" and that digital must carry "is not worth losing that resource."²⁴ Finally, a Seattle attorney who formed Citizens for C-SPAN filed on behalf of herself and the national organization's 200 members. With the experience of a veteran of the battles to restore C-SPAN and C-SPAN2 carriage after the drops caused by analog must carry and the 1992 Cable Act, she says C-SPAN's "window on politics allows people from all socio-economic backgrounds and from across the country to see an unfiltered view of their government" that is "not found anywhere else on television."²⁵

V. CONCLUSION

Against this record, there is no justification for government intervention here. Even since the initial Comments were filed, the marketplace has indicated that it will work this issue out, as evidenced by the recent Time Warner Cable - CBS digital carriage agreement. A private desire to sell expensive new television sets is not an acceptable rationale for the abridgment of First Amendment rights.

Respectfully submitted,

THE C-SPAN NETWORKS

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December 22, 1998

²⁴ Comments of Paula Wilson.

²⁵ Comments of Regina LaBelle.

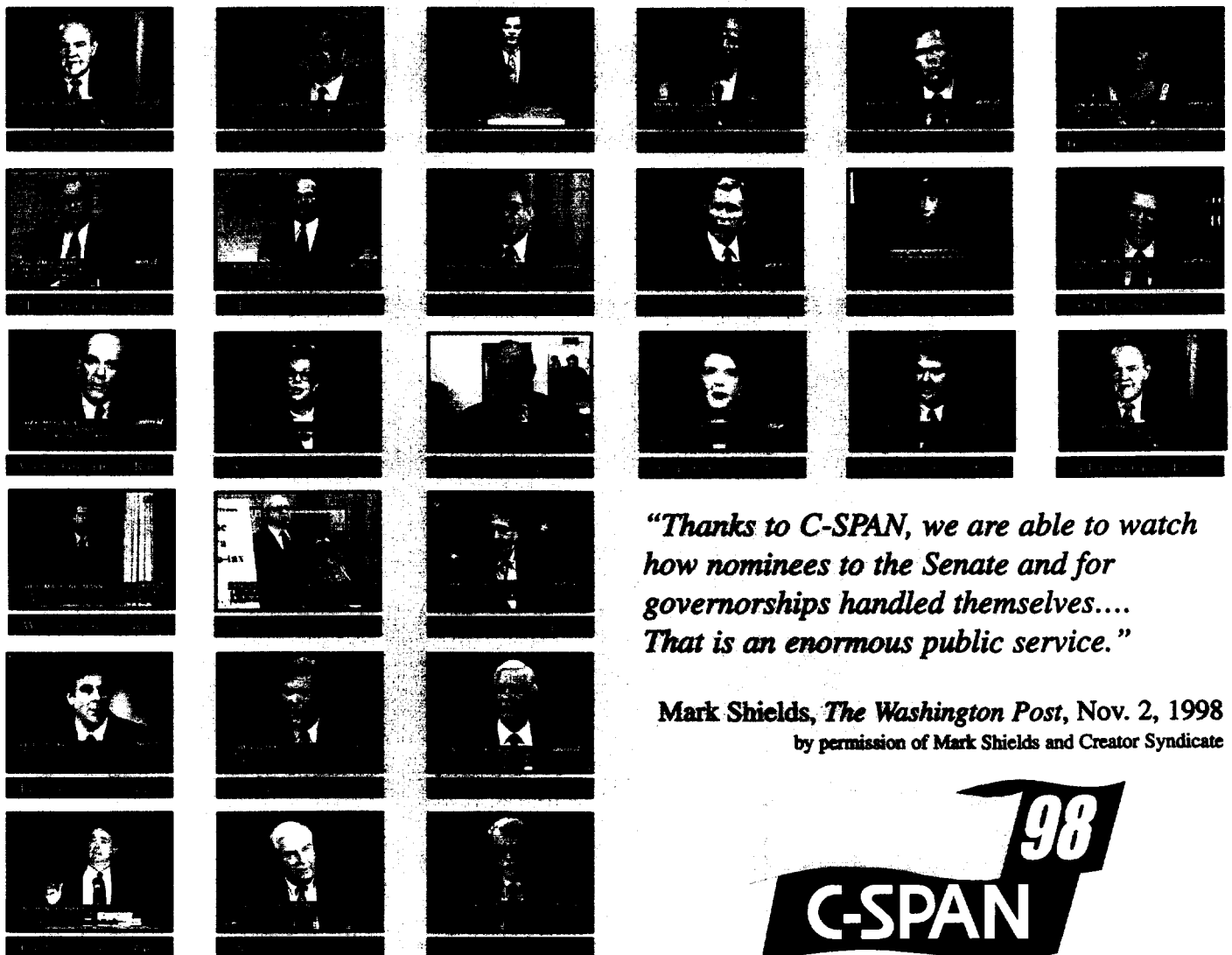
EXHIBIT A

C-SPAN *Campaign '98* Advertisement

8,100 131 CONGRESSIONAL AND GOVERNORS' DEBATES MINUTES OF "FREE AIR TIME" FOR CANDIDATES COURTESY OF CABLE TV AND C-SPAN

This fall, with help from local television stations across the country, C-SPAN aired 131 political debates — in prime time. In some cities, C-SPAN was the only place where people could watch local candidates sound out the issues during prime time.

131 debates. 8,100 minutes of "free air time" for political candidates and their issues. That's exactly the kind of public service the cable industry had in mind when it created C-SPAN more than 20 years ago.



"Thanks to C-SPAN, we are able to watch how nominees to the Senate and for governorships handled themselves.... That is an enormous public service."

Mark Shields, *The Washington Post*, Nov. 2, 1998
by permission of Mark Shields and Creator Syndicate



TWENTY YEARS OF PUBLIC AFFAIRS PROGRAMMING. CREATED BY AMERICA'S CABLE COMPANIES.

EXHIBIT B

DMC: Unfair, Unconstitutional, Un-American

DMC
DIGITAL MUST CARRY

Unfair
Unconstitutional
Un-American